United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1775

United States Court of Appeals
FOR THE SECOND CIRCUIT

HUGO STINNES STEEL AND METALS COMPANY,
(Division of Hugo Stinnes Corporation),

Plaintiff-Appellant,

-against-

S.S. ELBE OLDENDORFF, her engines, boilers, etc., EGON OLDENDORFF and ATLANTIC SHIPPING COMPANY, S.A.,

Defendants-Appellees.

On Appeal from the United States District Court,
For the Southern District of New York

BRIEF FOR ATLANTIC SHIPPING COMPANY, S.A.

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Defendants-Appellees. :

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BRIEF ON BEHALF OF ATLANTIC SHIPPING COMPANY, S.A., (DESIGNATED DEFENDANT-APPELLEE)

PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of Atlantic Shipping Company, S.A. (hereinafter "Atlantic"). There was no jurisdiction over Atlantic in the Southern District of New York. However, on February 21, 1974, the attorneys for plaintiff-appellant made a threat to enter a default against Atlantic, and Atlantic retained Haight, Gardner, Poor & Havens to investigate the status of the suit in the District Court and in doing so plaintiff-appellant's counsel were notified and they requested an

appearance at a Pre-Trial Conference before Hon. Charles M. Metzner scheduled for March 25, 1974. LeRoy S. Corsa, a Member of Haight, Gardner, Poor & Havens, attended at a Conference as an observer. Thereafter, although Atlantic was not a party, counsel for plaintiff-appellant served Haight, Gardner, Poor & Havens with the Notice of Appeal and its Brief.

Atlantic submits this brief in reply and begs permission to be heard because of its obvious interest in the case.

STATEMENT OF CASE

This is an appeal from the Order filed March 26, 1974, in the Southern District of New York (Metzner, J.) dismissing the action for lack of prosecution. Plaintiff-appellant also attempts to appeal from an Order filed September 19, 1973, denying plaintiff-appellant's motion to transfer the action to the Southern District of Georgia, Savannah Division.

QUESTIONS PRESENTED

1. Did the District Court abuse its discretion in dismissing the action for lack of prosecution?

2. May plaintiff-appellant now appeal from the Order filed September 19, 1973, denying the motion to transfer this action?

3. In any event, did the District Court abuse its discretion in refusing to change the venue of this action?

FACTS

Hugo Stinnes Steel & Metals Company (Division of Hugo Stinnes Corporation), a foreign corporation, brought suit in the Southern District of New York on December 29, 1971, to recover for alleged damage to goods loaded at Antwerp, Belgium aboard the S.S. Eibe Oldendorff and discharged at Savannah, Georgia pursuant to ocean bills of lading dated December 15, 1970. Suit was filed against the S.S. Elbe (sic) Oldendorff, in rem, Egon Oldendorff, the vessel's German owner (hereinafter "Oldendorff") and Atlantic, the vessel's Panamanian time charterer.

Plaintiff-appellant's counsel have included in the "Joint" Appendix all of the affidavits and exhibits submitted on April 9, 1974, to Judge Metzner on a motion by said counsel pursuant to Rule 60(b) of the Federal Rules of Civil Procedure to vacate the Order of Dismissal filed March 26, 1974. Such affidavits and exhibits are not a part of the "record" that was before Judge Metzner at the time he dismissed the action on March 26, 1974. However, the opinion of Judge Metzner denying said motion was not included in the "Joint" Appendix. Copy of Judge Metzner's five page Opinion dated May 6, 1974, is re-

spectfully attached as Exhibit "A" to this Brief. Judge Metzner has accurately set forth the facts of the proceedings before him and will not be unnecessarily repeated herein. Plaintiff-appellant has not appealed from Judge Metzner's Order of May 6, 1974, in which plaintiff-appellant argued that the judgment was a result of "mistake, inadvertence and excusable neglect".

POINT I

THE DISTRICT COURT DID NOT ERR IN DISMISSING THE ACTION FOR FAILURE TO PROSECUTE. SUCH DISMISSAL "WILL NOT BE REVERSED EXCEPT FOR ABUSE OF DISCRETION."

Plaintiff-appellant has not discussed or even mentioned whether Judge Metzner abused his discretion in dismissing the action for failure of plaintiff to prosecute. Yet, there are numerous decisions in this Circuit holding that any such dismissal will not be reversed unless there has been a showing of abuse of discretion.

In Taub v. Hale, 355 F. 2d 201 (2nd Cir. 1966), this Court affirmed such a dismissal stating, at page 202:

> "Under that Rule (F.R. Civ. P. 41(b) and the inherent power of a court to dismiss for failure to prosecute, a district judge may, sua sponte, and without notice to the parties, dismiss a complaint for want of prosecution, and such dismissal is largely a matter of the judge's discretion. (citations omitted)."

In the case at hand, Judge Metzner has correctly demonstrated that on the record before him, plaintiff-appellant abandoned the action between September 19, 1973, until January 25, 1974, at which time the Court demanded counsel's appearance at a Pre-Trial Conference. (Plaintiff-appellant's counsel also admits that from April, 1972 to

May, 1973, no attorney was aware that this action was pending. Plaintiff-appellant's Brief, page 4). At the January 25, 1974 conference, counsel for plaintiff-appellant consented to a dismissal within sixty days if the case was not then settled. (Exhibit A, Judge Metzner's Opinion dated May 6, 1974, at page 3.) When Judge Metzner called the case in sixty days, the suit was still open which then led to the promised "consent" dismissal of March 26, 1974, the Order now being appealed. On the record, it is clear that Judge Metzner acted with careful discretion, and permitted plaintiff-appellant time to prosecute before dismissing the suit which was then over three years old.

It should also be noted that the first notice that Judge Metzner obtained that plaintiff-appellant had started a subsequent action in a state court of Georgia was through an inquiry from Chief Judge Lawrence of the Southern District of Georgia made subsequent to the Pre-Trial Conference of January 25, 1974.

In Schwarz v. United States, 384 F. 2d 833 (2nd Cir. 1967), this Court affirmed a District Court's dismissal for lack of prosecution because plaintiff was not ready for trial. Citing Link v. Wabash Railroad Co., 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962), this Court stated:

> "We have found no case of reversal by an appellate court of a District Court's exercise of discretion in circumstances such as these. ..." (supra, at page 835)

Plaintiff-appellant has noted that it could not obtain jurisdiction over defendants in the Southern District of New York. In Messenger v. United States, 231 F. 2d 328 (2nd Cir. 1956), a plaintiff was faced with the same problem. However, this Court affirmed the District Court's dismissal of the action and Circuit Judge Hincks, in a concurring Opinion, stated at page 333:

> " ... Since he was not entitled to proceed with the prosecution of his action until he had caused the defendant to be brought into the jurisdiction of the court, and since his failure so to do continued to the very time that he was faced with a motion of dismissal, I think dismissal was imperatively required under Rule 41(b). ... (emphasis added)

In spite of some passing reference in plaintiff-appellant's brief that service of process was made on Atlantic, plaintiff-appellants have conceded in sworn affidavits that the lower court did not have jurisdiction over Atlantic. (R - 13 - 14 - Ryniker affidavit). Further, in the headnote of POINT I of plaintiff-appellant's brief, page 4, it is admitted that no jurisdiction had been obtained over defendants.

Moreover, plaintiff-appellant's attempts to obtain jurisdiction over any of the defendants in the Southern District of New York does not prove that they could not have obtained jurisdiction over any of defendants.

Plaintiff-appellant's counsel was fully aware that the remedies of the Supplemental Rules for Certain Admiralty & Maritime Claims were available to obtain in rem or quasi in rem jurisdiction over shipowner Oldendorff or the defendant S.S. Eibe Oldendorff. (See plaintiff-appellant's brief page 3 and R. 29, 30 and 31.) However, plaintiff did not attempt to use any of the remedies of the Supplemental Rules to obtain quasi in rem jurisdiction over Oldendorff in this District because Oldendorff threatened to "arrest property of Hugo Stinnes Corp. in Germany". (R. 30). Why didn't plaintiff-appellant, a German citizen sue Oldendorff, a German citizen, in a German Court in the first place? It is submitted that if the threat of Oldendorff had any legal basis, which basis is doubted, plaintiff-appellant was "doomed" from the outset of this litigation as to a cause of action in rem or quasi in rem.

Had Atlantic been a party to the proceedings in the District Court, ample evidence would have been presented to show that plaintiff-appellant could have caused the Court to have jurisdiction over Oldendorff, in personam. According to Lloyd's Register of Shipping, the S.S. Gerdt Oldendorff, a vessel also owned by Oldendorff, called at the Port of New York on seven occasions in the year 1972. Other vessels owned by Oldendorff also called at the Port of New York during 1972 and 1973. On each of these occasions plaintiff-appellant could have obtained jurisdiction over Oldendorff. In fact, the Master of any such

vessel, as a "managing agent" of Oldendorff, could have been served with process to obtain in personam jurisdiction over Oldendorff without plaintiff-appellant having to attach the vessel by way of a provisional remedy.

This suit was also started against the vessel S.S. Eibe Oldendorff in rem. Although Oldendorff subsequently sold this vessel (R. 30), the maritime lien and the in rem cause of action remained against the carrying vessel. If Atlantic had been a party below, Judge Metzner would have been advised that the S.S. Eibe Oldendorff actually called at the Port of New York from July 2, 1973 to July 6, 1973. During this period of time, plaintiff-appellant could have obtained in rem jurisdiction over the carrying vessel and forced Oldendorff to appear in this action as well.

The just mentioned facts were not before Judge Metzner in March 1974, but they certainly are crucial facts, taken alone, that adequately would support a discretionary move in dismissing plaintiff-appellant's action for failure to prosecute.

In any event, on the basis of the record of this case, Judge Metzner did not abuse his discretion in dismissing this case. His only alternative was to permit plaintiff-appellant, notwithstanding its counsel's January, 1974, agreement to dispose of the case, to let the case lie dormant in the District Court in the hope that counsel may be diligent enough to obtain jurisdiction over the vessel or Oldendorff.

Perhaps Judge Metzner had in mind Judge Tyler's language in a recent case, The Crispin Company v. S.S. Jowood, et. al., 1973 A.M.C. 2623 (S.D.N.Y. 1973)(not officially reported),

> " ... a plaintiff should not be able to keep an action going indefinitely on the claim that at some unknown date in the future the res will appear within the jurisdiction of the court without giving any basis whatsoever for such a hope. No event in this case is alleged to have occurred in the Southern District of New York. The ship was not sailing to or from this district. There are no facts to support the conclusion that the vessel can be expected to come within the jurisdiction of this court. ... There is no showing that the owner of the ship is in any way present in this jurisdiction."
>
> (supra, at page 2624)

In Davis v. United Fruit Company, 402 F. 2d 328 (2nd Cir. 1968), this Court stated, at pages 331-2:

> " . . . We will not interfere with the conscientious judge who will not accept the status quo of calendar congestion. The task of updating calendars is arduous, complicated and burdensome. Since the trial judge must be entrusted with the power to alleviate calendar congestion, we shall not put obstacles in his way when he exercises his judgment wisely in achieving the desired goal".

See also West v. Gilbert, 361 F. 2d 314 (2nd Cir. 1966), at page 316.

POINT II

PLAINTIFF-APPELLANT CANNOT NOW SEEK REVIEW OF THE ORDER OF SEPTEMBER 19, 1973, DENYING THE MOTION UNDER 28 U.S.C. 1404(a). IN ANY EVENT, THE DISTRICT COURT DID NOT ERR IN REFUSING TO TRANSFER THE SUIT. THERE IS NO EVIDENCE THAT THE DISTRICT COURT ABUSED ITS DISCRETION.

The Notice of Appeal (R-58) merely recites that plaintiff-appellant appeals from the Order dismissing the complaint and judgment of March 26, 1974. No mention is made in the Notice of Appeal of the Order dated September 19, 1974, denying plaintiff-appellant's motion to transfer the action. Rule 3 (c), Federal Rules of Appellate Procedure, requires that:

> "the notice of appeal shall . . . designate the judgment, order or part thereof appealed from . . . "

It is submitted that the provision of the rule constitutes a mandatory requirement and the jurisdiction of this Court on appeal is limited to review of the judgment dismissing the action for failure to prosecute. Gannon v. American Airlines, 251 F. 2d 476 (10th Cir. 1958), Long v. Union Pac. R. Co., 206 F. 2d 829 (10th Cir. 1953), Gunther v. E. I. Dupont De Nemours & Company, 255 F. 2d 710, 717 (4th Cir. 1958). If

a plaintiff-appellant limits the issues in a Notice of Appeal, the Court of Appeals is deprived of jurisdiction as to any other issues. Benenson v. United States, 385 F. 2d 26, 29 (2nd Cir. 1967). Accordingly, only those orders designated in the Notice of Appeal are reviewable.

Although Atlantic maintains that the issue of whether Judge Metzner erred in not granting plaintiff-appellant's motion to transfer this case is not before this Court, there was, in any event, no abuse of discretion by the District Court in refusing to transfer the action.

Plaintiff-appellant's brief merely recites that the District Court has the power to transfer the action under 28 U.S.C. 1404(a), but does not set forth any reasons or evidence to show that on the basis of the record before it,the District Court abused its discretion in refusing to transfer the action.

Plaintiff-appellant filed the motion to transfer the action from the Southern District of New York to the Southern District of Georgia, Savannah Division, on June 29, 1973, eighteen months after suit had been filed and two and one-half years after the goods had been discharged from the vessel. The scant record before the District Court was a Notice of Motion and an affidavit by the attorney for plaintiff-appellant. (R-11,12,13,14). The District Judge had had the suit on his calendar for a considerable period

of time, was told that plaintiff had been unable to secure jurisdiction over any of the defendants and was asked to put a 1971 case before a District Judge in Savannah. It is apparent that the District Judge had come to the conclusion that the "interests of justice" were not served in this case in permitting a transfer.

The law is uniform that appellate courts will not disturb a District Court's exercise of discretion unless such discretion is clearly abused. In fact, there is no case, decided by the Second Circuit Court of Appeals, holding that a District Court had abused its discretion in regard to Section 1404(a).

In A. Olinick & Sons v. Dempster Brothers, Inc., 365 F. 2d 439 (2nd Cir. 1966), the question came up on a writ of mandamus and this Court held, at page 445:

> "We do not need to decide whether we would have decided the motion for a transfer differently than did the trial court, had the motion been ours to decide. [footnote omitted] ... We cannot hold that the trial court's decision to transfer the present case, made only after oral argument and the submission of thorough affidavits and memoranda of law, ... and on careful consideration of the convenience of parties and witnesses and the interest of justice, was a clear-cut abuse of discretion."
>
> (emphasis added)

In Ford Motor Co. v. Ryan,182 F. 2d 329, cert. denied, 340 U.S. 851 (1950), the late Judge Frank stated, at pages 331-2:

> " ... At best, the judge must guess, and we should accept his guess unless it is too wild."

In Lykes Bros. S.S. Co. v. Sugarman, 272 F. 2d 679, 680 (2nd Cir. 1959), this Court stated that transfers are " ... peculiarly one for the exercise of judgment by those in daily proximity to these delicate problems of trial litigation. ..."

Here, the trial judge found that as of September 19, 1973, the claim was "stale". He had been told, under oath, that no service of process was made. He had not been told, under oath, that defendants had not been advised of the pendency of the suit. Plaintiff-appellant would assume that Judge Metzner did not take any such factor into consideration. Judge Metzner stated "stale" claim, not "unknown" claim. Certainly, a cargo damage claim which is over two and one-half years old is "stale", especially when there is no defendant before the Court.

Judge Metzner, in citing Goldlawr, Inc. v. Heiman, 369 U.S. 463, 82 S. Ct. 913 (1962), was fully aware that he had the power to transfer this case to Georgia even though no jurisdiction had been obtained over defendants. However, on the record before him, Judge Metzner could only conclude that the suit had been left dormant on the District Court's docket since December, 1971, and plaintiff-appellant's counsel had not yet been able to secure jurisdiction over any of the defendants. Had Atlantic been a party to the

transfer motion proceedings, the record before Judge Metzner would have contained evidence that jurisdiction could have been obtained over Oldendorff in personam and probably the offending vessel in rem. (See infra, POINT I, pages 8-9)

Plaintiff-appellant's position is that if an action is timely filed in a District Court and, after remaining in the District Court for eighteen months, no service of process had been made upon any defendant, a District Judge absolutely abuses his discretion if he fails to transfer the suit to a District where jurisdiction can be obtained. Plaintiff-appellant absurdly equates the power of a District Judge to transfer a suit with the duty of a District Judge to make a transfer. In spite of the clear statutory language that " ... in the interests of justice, a district court may transfer ...", (emphasis added) plaintiff-appellant would have this Court change the statutory wording to " ... shall transfer ...".

Further, plaintiff-appellant requests this Court to now substitute its discretion for that of the trial judge and order the action transferred to the Southern District of Georgia, Savannah Division. Yet, plaintiff-appellant, with a New York office chose the Southern District of New York for the trial. Judge Metzner gave "great weight" to plaintiff-appellant's choice of forum. After Judge Metzner denied plaintiff-appellant's motion to transfer pursuant to 28 U.S.C. 1404(a), plaintiff-appellant did not seek a re-

argument of such motion. If it was thought that Judge Metzner had incorrectly noted any pertinent facts, as is stated now, then, not now, was the time to bring forth such facts on a motion to re-argue. Or, if plaintiff-appellant believed that there was an abuse of discretion, appellate review could have been sought and requested issuance of a prerogative writ. Ford Motor Co. v. Ryan, supra, Golconda Mining Corp. v. Herlands, 365 F. 2d 856 (2nd Cir. 1966).

> " 'Abuse of discretion' is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors."

In re Josephson, 218 F. 2d 174 (1st Cir. 1954), at page 182.

CONCLUSION

THERE HAS BEEN NO SHOWING OF AN ABUSE OF DISCRETION. THE JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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HUGO STINNES STEEL AND METALS COMPANY (Division of Hugo Stinnes Corporation), :

Plaintiff, :

-against- : 71 Civ. 5692

S.S. ELBE OLDENDORFF, etc., EGON OLDENDORFF and ATLANTIC SHIPPING COMPANY, S.A., :

Defendants. :

. x

METZNER, D.J.:

This is a motion pursuant to Rule 60(b), Fed. R. Civ. P., to vacate a final judgment entered against plaintiff under General Rule 29 of the Southern District of New York, on March 25, 1974. As the history of this litigation shows, the plaintiff is entitled to top rating for persistency.

This court has previously detailed the facts of this litigation in an opinion denying plaintiff's motion to transfer the action to the Southern District of Georgia. 363 F. Supp. 1391 (S.D.N.Y. 1973). That motion was denied on September 19, 1973, nearly two years after the complaint

was filed in December 1971. At that time plaintiff argued that service of process had not been, and could not be, effected against the defendants in this district, and therefore transfer of the action was required to a district where the defendant would be amenable to service of process. Plaintiff's problem was that the statute of limitations had run in January 1972. The court denied the application on the ground that "Section 1404(a) was not intended to be used to bail out a plaintiff in circumstances such as are present here." 363 F. Supp. at 1392.

Plaintiff did not take any further steps in this district with respect to the prosecution of this action. Instead, on October 13, 1973, plaintiff commenced a new suit in the state court of Georgia, and service of process was perfected over defendant Atlantic Shipping by serving its agent there. The action was thereafter removed to the Southern District of Georgia. On January 10, 1974, Chief Judge Lawrence dismissed the action on the ground that it was time barred by the one-year limitation in COGSA. He had not been made aware of the pendency of the action in this court. Reargument was then granted on the question of whether the pendency of the action in this district tolled the statute of limitations in the Georgia suit.

On March 14, 1974, Judge Lawrence again dismissed the action in an opinion which held that the pendency of the New York suit did not toll the statute.

In the meantime, nothing was heard from plaintiff in this court until January 25, 1974, when the case was called in for a pretrial conference. At that time counsel for plaintiff again advised the court that service of process was not possible in this district and that the court could dismiss the action within sixty days if the case was not settled. The case was again called on March 25, 1974. Counsel orally renewed its previous motion which was denied and the case dismissed upon the court being advised that no settlement was possible.

The basis for the instant motion is that plaintiff now believes that there might be a basis for acquiring jurisdiction in this suit over defendant Atlantic Shipping under an agency estoppel theory. It contends that its prior service of process on a former agent of Atlantic, which it has always maintained was ineffective, might now be valid. It also argues that it has been vigourously prosecuting this action since the spring 1973 and therefore the action should not have been dismissed for failure to prosecute under General Rule 29.

This argument is totally unpersuasive. First, plaintiff's activities in the Georgia courts do not constitute prosecution of the action in this district which is the yardstick against which the instant motion must be gauged.

After this court denied the motion to transfer last September, plaintiff consciously abandoned the prosecution of the action within this district since it had conceded that jurisdiction could not be acquired over the defendants. It was only after its efforts to press its case in Georgia twice failed that plaintiff indicated a desire to renew the action here. It resisted dismissal in January on the plan that a settlement was in the offing and consented to a dismissal at that time if they were unsuccessful in this endeavor.

Plaintiff has consistently maintained throughout the course of the proceedings in this court and in Georgia that personal jurisdiction could not be obtained in this district. This was the very reason for seeking a transfer last September and for plaintiff's subsequent attempts at litigating the action in Georgia. It stretches credutility for plaintiff to now contend that jurisdiction may in fact exist after all.

The underlying claim in this suit is over three years old and the only thing that has been accomplished thus far is the filing of a complaint.

On the state of the record here and in Georgia, this court cannot help but conclude that plaintiff has failed to diligently prosecute its case in this district.

The motion to vacate the final judgment dismissing the complaint is denied.

So ordered.

Dated: New York, New York,
May 6, 1974.

U. S. D. J.